U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 03Jun2002

Case No. 2001-ERA-00036

In the Matter of

LYDIA DEMSKI,
Complainant,

v.

INDIANA MICHIGAN POWER COMPANY,
Respondent.

ORDER AMENDING CAPTION AND RECOMMENDED ORDER OF DISMISSAL

This proceeding arises under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. §§ 5801-5891 and the regulations promulgated thereunder at 29 C.F.R. Part 24 which are employee protective provisions of the ERA or of the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2011, et seq. Regulation section numbers mentioned in this Order refer to sections of that Title unless otherwise noted. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC. This matter is presently before me on Respondent's Motion for Dismissal with briefs filed by both parties.

Included with the briefs are affidavits and exhibits offered in support of the motions and objections of the parties. Hereby received into the record are Respondent's Exhibit 1 - (attached as Exhibit A to Respondent's Brief in support of its motion to dismiss) 1996 through 2001, Michigan Annual Report for Domestic Corporations filing forms for Scope Services Inc.; Respondent's Exhibit 2 - (attached as Exhibit B to Respondent's Brief in

support of its motion to dismiss) 1996 through 2001, Michigan Annual Report for Domestic Corporations filing forms for

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American Nuclear Resources, Inc., Respondent's Exhibit 3 - (attached as Exhibit C to Respondent's Brief in support of its motion to dismiss) Affidavit of William Linn sworn to on September 5, 2001; Respondent's Exhibit 4 - (attached as Exhibit A to Respondent's Reply Brief in support of its motion to dismiss) a March 15, 2000, letter from the Complainant to the U.S Department of Labor, Occupational Safety and Health Administration ("OSHA"); Respondent's Exhibit 5 - (attached as Exhibit B to Respondent's Reply Brief in support of its motion to dismiss) the NRC Licenses for the D.C. Cook Nuclear Power Plant; Respondent's Exhibit 6 - (attached as Exhibit C to Respondent's Reply Brief in support of its motion to dismiss) transcript of the NRC official interview of the Complainant conducted on February 17, 2000; Complainant's Exhibit 1 - The Affidavit of Catherine Rogers sworn October 12, 2001; Complainant's Exhibit 1(a) - transcript of the NRC official interview of Daniel Krause conducted on June 7, 2000; Complainant's Exhibit 1(b) - transcript of the NRC official interview of William Linn conducted on March 28, 2000; Complainant's Exhibit 1(c) - transcript of the NRC official interview of William Hannah conducted on June 7, 2000; Complainant's Exhibit 1(d) - transcript of the NRC official interview of James Molden conducted on June 7, 2000; Complainant's Exhibit 1(e) - transcript of the NRC official interview of Stephen Smith conducted on June 8, 2000; Complainant's Exhibit 1(f) - transcript of the NRC official interview of John Allard conducted on March 28, 2000; Complainant's Exhibit 1(g) - June 13, 2000, letter to R.P. Bowers, Senior Vice-President Nuclear Generation Group, American Electric Power Company, from John A. Grobe, Director, Division of Reactor Safety; Complainant's Exhibit 1(h) - a June 29, 2000, letter to the Complainant from Cynthia Lee, Area Director of OSHA; Complainant's Exhibit 2 - the Affidavit of the Complainant sworn on October 9, 2001; Complainant's Exhibit 2(a) - a fax sent January 5, 2001, to the Complainant from Daniel Krause; Complainant's Exhibit 2(b) - a March 15, 2000, letter to the U.S. Department of Labor, OSHA, from the Complainant; Complainant's Exhibit 2(c) - a March 2, 2000, fax to the Complainant from Daniel Krause; Complainant's Exhibit 2 (d) - a March 15, 2000, fax to the Complainant from Daniel Krause; and Complainant's Exhibit 2(e) - the business cards of William Linn, Jerry A. Levi, David Lefor, and Terry P. Bellman.

Also received into the record are the following Administrative Law Judge Exhibits. Administrative Law Judge Exhibit 1 - June 29, 2001, Secretary's Findings; Administrative Law Judge Exhibit 2 - June 29, 2001, letter to Respondent's counsel from OSHA Area Director, Cynthia Lee; Administrative Law Judge Exhibit 3 - June 29, 2001, letter to the Complainant from OSHA Area Director, Cynthia Lee; Administrative Law Judge Exhibit 4 - An April 4, 2000, OSHA Discrimination Case Activity Worksheet; Administrative Law Judge Exhibit 5 - a July 5, 2001, fax to the Chief Administrative Law Judge from Respondent's counsel; Administrative Law Judge Exhibit 6 - A June 29, 2001, letter to the Chief Administrative Law Judge from OSHA Area Director, Cynthia

Lee; and Administrative Law Judge Exhibit 7 - a June 29, 2001, letter to the Chief Administrative Law Judge from OSHA Area Director, Cynthia Lee.

An issue has also been raised in this matter regarding the alignment and names of the parties in the official caption of this case. The Pre-hearing order issued by the undersigned on July 31, 2001, lists American Electric Power ("AEP"), Scope Services, Inc., ("SSI") and American Nuclear Resources, Inc., et al, ("ANR") as the Respondents in this case. In an August 10, 2001, letter received from AEP, Counsel for that

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Respondent explains that Indiana Michigan Power Company, ("I & M") a wholly-owned subsidiary of AEP, is the properly named respondent and that Scope Services and American Nuclear Resources Inc., are not proper parties to this action. By reply letter dated August 13, 2001, counsel for the Complainant states that SSI and ANR should in fact be listed as complainants in this matter.

Background:

In December 1996, I & M entered into a contract with ANR/SSI for the performance of ice condenser maintenance at the Washington, D.C., Cook Nuclear Power Plant. (R. Ex. 3[1]) Subsequent to this contract, I & M and ANR/SSI entered into two additional contracts; one for performance of Staff Augmentation and one for performance of Buildings and Ground Maintenance. (Respondent's Brief in support of the Motion to Dismiss, at p. 1) The Complainant alleges these contracts were terminated in early 2000, as retaliation for concerns she raised in a December 23, 1999, meeting with Stephen Smith, the Manager of the Cook Plant Maintenance Installation Services Group. (R. Ex. 4, C. Ex. 2(b)) The Complainant filed a complaint with the Department of Labor on March 15, 2001, alleging that I & M acted in violation of the employee provisions of the ERA by terminating the contracts between I & M and ANR/SSI. (R. Ex. 4; C. Ex. 2(b)) Both OSHA and the NRC conducted investigations of the Cook Plant in 2000. Pursuant to its investigation, OSHA determined there was sufficient evidence to allow the Complainant to proceed with her ERA claim. (ALJX. 1, 2, 3, 4, 6). The matter was then referred to the Office of Administrative Law Judges for a formal hearing.

Motion to Amend Caption:

As counsel for the Complainant noted in his August 9, 2001, letter, ANR/SSI were incorrectly listed as Respondents in the official caption of this matter. Because the Complainant owns these companies, she cannot file an ERA Whistleblower claim against herself. The Complainant requests that the caption be amended to include ANR/SSI as complainants in this matter. However, I find that the Respondent is correct in that ANR/SSI cannot properly be named as complainants. The ERA, as explained fully below, provides a cause of action for "employee" discrimination. It does not provide a cause of action for corporations. Where a valid claim cannot be stated, dismissal with

prejudice is the proper remedy. High v. Lockheed Martin Energy Sys., Inc., 97-CAA-3 (ARB Nov. 13, 1997). Therefore, as ANR/SSI can neither be properly joined as Respondents nor Complainants in this matter, they are HEREBY DISMISSED with prejudice from this action.

Counsel for the Respondent also seeks to amend the caption to name the proper respondent as Indiana Michigan Power Company. In brief, the Respondent states that I & M is a wholly-owned subsidiary of AEP and that the licenses on file with the NRC lists I & M as the holder of the licenses for the Cook Nuclear Plant. The brief from Complainant, however, states that these licenses are in fact held by AEP.

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While the Complainant offers a letter from the NRC Division of Reactor Safety and addressed to the Senior Vice-president of "Nuclear Generation Group American Electric Power Company," I find that this letter, is inconclusive on the issue of licensor. I also find the affidavit testimony offered by the Complainant detailing instances where certain employees referred to themselves as employees of AEP inconclusive on this issue. In the ever name-changing world of corporate conglomerations, an employee's belief that they work for company "X" does not definitively prove that fact to be true. The Respondent has offered the actual NRC licenses of the Cook Plant. Reviewing those licenses I find that Indiana Michigan Power Company is the legal holder of the NRC licenses for the Cook Plant. As such the properly named party to this action should be Indiana Michigan Power Company and not American Electric Power. THEREFORE, IT IS HEREBY ORDERED that the official caption in this matter shall be amended to include Indiana Michigan Power Company as the Respondent.

Motion to Dismiss:

By Motion dated September 6, 2001, the Respondent seeks dismissal of the complaint filed by the Complainant, Lydia Demski, on the grounds that pursuant to the Federal Rule of Civil Procedure Rule 12(b)(6) the complaint fails to state a claim upon which relief may be granted. I & M avers that an element of the *prima facie* case for recovery under the ERA requires a complainant to allege in the complaint that he or she is a "covered employee" under the Act. As Ms. Demski does not allege that she is a "covered employee" under the ERA in her complaint, she has failed to state a claim upon which relief may be granted, and, therefore, dismissal is warranted in this matter. In reply brief, in opposition to I & M's motion, counsel for the Complainant argues that Ms. Demski is a "covered employee" under the Act, seeks leave to amend the original complaint, and asks that I deny the motion of the Respondent.

Twenty nine C.F.R. 18.1(a) states that the Federal Rules of Civil Procedure "shall be applied in any situation not provided for or controlled by [the Rules of Practice and Procedure for Administrative Hearings], or by a statute, executive order or regulation. As "neither 29 C.F.R. Part 24 nor 29 C.F.R. Part 18 [the Rules of Practice and Procedure for

Administrative Hearings] address dismissal for failure to state a claim . . .", rule 12(b)(6) governs dismissal of whistleblower retaliation claims in the context of the ERA. Glenn v. Lockheed, 1998-ERA-35 & 50 at 7 (ALJ July 15, 1999) (*citing* Freels v. Lockheed Martin Energy Sys., ARB NO. 95-110, ALJ Nos. 95-CAA-2 & 94-ERA-6 at 10 (ARB Dec. 4, 1996)). In considering a 12(b)(6) motion, the facts as alleged in the complaint are taken as true and all reasonable inferences are made in favor of the non-moving party. See Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2 & 5, 93-CAA-1, 94-CAA-2 & 3, 95-ERA-1 at 35 (ARB June 14, 1996) *aff'd*, 141 F.3d 625 (6th Cir. 1998).

Failure to state a claim for which relief may be granted under the ERA generally requires dismissal of the complaint. Hasan v. Commonwealth Edison Co., ARB No. 00-028, ALJ No. 2000-ERA-1 at 4 (ARB Dec. 29, 2000); Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2 and 5, 93-CAA-1, 94-CAA-2 & 3, 95-ERA-1 at 33-39. Dismissal is appropriate where the complaint is legally insufficient, i.e., where "even i[f] the complainant could prove all of his factual allegations, he would not prevail." Glenn, 1998-ERA-35 & 50 at 7 (internal citations omitted). Failure to allege a *prima facie* case is grounds for immediate dismissal. Hasan v. Wolfe Creek Nuclear Operating Corp., 2000-ERA-14 at 2 (ALJ Oct. 5, 2000) *aff'd* (ARB May 31, 2001) (Internal citations omitted).

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In brief, I & M avers that Ms. Demski has not alleged that she is a "covered employee" under the ERA and has, therefore, failed to set forth an essential element of a claim as required by the ERA. The ERA prohibits an Employer from discharging or otherwise discriminating against "any employee . . . with respect to his compensation, terms, conditions or privileges of employment" in retaliation for protected activity. 42 U.S.C. § 5851(a). The ERA authorizes "any employee who believes that he has been discharged or otherwise discriminated against . . . [to] file . . . a complaint with the Secretary of Labor . . . ." 42 U.S.C. §5851(b). Furthermore, 29 C.F.R. §24.3(a) provides that "[a]n employee who believes that he or she has been discriminated against by an employer . . . may file . . . a complaint alleging such discrimination." Twenty-nine C.F.R. §24.5(b)(1) requires dismissal of a complaint that fails to allege the elements of a *prima facie* case of discrimination. A *prima facie* case includes an allegation that "[t]he employee engaged in protected activity" and that "[t]he employee has suffered an unfavorable personnel action . . . ." 29 C.F.R. §24.5(b)(2). Additionally, an ERA *prima facie* case requires a showing that, "[the complainant] was an employee of a covered employer, the complainant engaged in protected activity, the complainant thereafter was subject to adverse action regarding such employment, and the [r]espondent knew of the protected activity when it took the adverse action and the protected activity was the reason for the adverse action." Saporito v. Florida Power & Light Co., 94-ERA-35 at 4 (ARB July 19, 1996) (*citing* Simons v. Simmons Food Inc., 49 F.3d 386, 389 (8th Cir. 1995); Mackowiak v. Univ. Nuclear Sys., Inc., 735 F.2d 1159, 1162 (9th Cir. 1984); Carroll v. Bechtel Power Corp., 91-ERA-0046, Sec'y Dec., Feb. 15, 1985, slip op. at 11 n. 9, *aff'd sub. nom.* Carroll v. U.S. Dep't. of Labor, 78 F.3d 352 (8th Cir. 1996).

Failure by a complainant to prove that he or she had an employee-employer relationship with a named respondent results in dismissal of the complaint. See Reid v. Methodist Med. Ctr. of Oak Ridge, 106 F.3d 401 (6th Cir. 1996); Williams v. Lockheed Martin Energy Sys., Inc., ARB No. 98-059, ALJ NO. 1995-CAA-10 at 9 (ARB Jan. 31, 2001); Varnadore v. Oak Ridge Nat'l Lab., 92-CAA-2 & 5, 93-CAA-1, 94-CAA-2 & 3, 95-ERA-1 (ARB June 14, 1996) *aff'g* Varnadore, 95-ERA-1 at 9-10 (ALJ Sept. 20, 1995). The Respondent avers that because the Complainant fails to allege in her complaint that she is or was an I & M employee or an employee of an I & M contractor or subcontractor, she fails to allege an essential element of a *prima facie* case under the ERA. As such, the Respondent seeks dismissal of this claim.

The Complainant, in response, argues that this complaint should not be dismissed based upon a technical failure to allege she was a "covered employee" because at the time of the filing of the complaint, the Complainant was proceeding *pro se*. The Complainant further states that she does satisfy the requirements of a *prima facie* case under the Act and seeks to amend her original complaint to allege she is in fact a "covered employee".

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I begin by noting that,

> In considering dismissal for failure to state a claim, all reasonable inferences are made in favor of the non-moving party especially when the complaint was filed *pro se*. Dismissal should be denied unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Studer v. Flower Baking Co. of Tenn., Inc., 93-CAA-11 (Sec'y June 19, 1995) (internal citations and quotations omitted). Twenty-nine C.F.R. §24.3(c) does not require that the complaint subscribe to any particular form but only that it be "in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute a violation." In the present case, Ms. Demski's *pro se* complaint satisfies the basic requirements of §24.3(c).

The Complainant is correct in that not every element "of a legal cause of action" must be set forth in an employee §5851 complaint. Bassett v. Niagra Mohawk Power Co., 86-ERA-2 at 4 (Sec'y July 9, 1986) (finding no basis for dismissal and remanding the case for hearing on the merits where the complainant failed to identify the protected activity and legally cognizable adverse employment actions with specificity) (*citing* Richter v. Baldwin Assoc., 84-ERA-9 at 6 (Sec'y March 12, 1986)); see also Nunn v. Duke Power Co., 84-ERA-27 at 8 n.3 (Dep. Sec'y July 30, 1987). Leaves to amend are generally warranted and appropriate in those cases where a complainant has acted in good faith but has nevertheless failed to satisfy a technical requirement of the regulations. "If and wherever determination of a controversy on the merits will be facilitated thereby, the administrative law judge, may, upon such conditions as are necessary to avoid

prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints . . . ." 29 C.F.R. §18.5(e). However, amendment of the complaint is neither warranted nor permitted where correction of the technical defect still leaves a claim substantly deficient. The latter scenario is present in the instant case. For the reasons set forth below, even if I permit the Complainant to amend her complaint and now allege she is a "covered employee", the facts demonstrate that she is not an "employee" as required by the ERA.

The term "employee" is not specifically defined in the ERA. However, whistleblower protection has been interpreted broadly and found by the courts to cover a variety of workers at nuclear facilities. See Connecticut Light & Power Co. v. Sec'y of the U.S. Dep't of Labor, 85 F.3d 89, 94 (2nd Cir. 1996). The United States Supreme Court has held that where Congress fails to define the term "employee" in Federal employment discrimination statutes, the term must be construed to incorporate the master-servant relationship as understood by common law agency doctrine. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 348 (1992). The Darden decision overrules previous decisions holding that the term "employee" should be construed "in light of the mischief to be corrected and the end to be obtained" by the statute in which the term "employee" is used. Id. at 324, *quoting* U.S. v. Silk, 331 U.S. 704, 713 (1947).

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The Administrative Review Board ("ARB") test for determining whether a complainant is a "covered employee" under the ERA is the application of common law agency principles as set forth in Darden. Boschuk v. J & L Testing, Inc., ALJ No. 96-ERA-16, ARB NO. 97-020 at 2 (ARB Sept. 23, 1997). In Nottingham v. Federal Prison Indus. (Unicor), 91-CAA-2 at 5 (ALJ Apr. 23, 1991) *aff'd* (Sec'y Mar. 17, 1995), I held that

> Although the term 'employee' is not defined [by the statutes] there is nothing therein to suggest that either statute contemplates anything other than an employment relationship in the traditional sense. Moreover, while I fully agree that the term 'employee' should be broadly construed so as to provide protection to as large a population of whistleblowers as possible [the] statutes [do not] compel that the normally recognized concept of an employer-employee relationship be convoluted to extend coverage.

Nottingham, 91-CAA-5 at 2. While the Nottingham decision dealt with statutes not presently at issue in this case, the logic of that decision is applicable here.[2]

In the instant case, I find that the Complainant is not an employee of the Respondent, I & M. Under Darden, the Court enumerated a number of factors which must be analyzed to determine if a "hired party is an employee under the general common law of agency." Darden, 503 U.S. 323-324. (Internal citations omitted) The Respondent initially argues that the Complainant in this case is not a "hired employee" for purposes of the Darden test. "[O]nly when a 'hire' has occurred, should the common law agency analysis be

undertaken." O'Connor v. Davis, 126 F.3d 112, 115 (2nd Cir. 1997). An individual is not a "hired party" unless that individual received financial compensation. Id. at 115-116. See also Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236, 1243 (11th Cir. 1998); McGuiness v. Univ. of New Mexico Sch. of Med., 170 F.3d 974, 979 (10th Cir. 1998); Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990); Nottingham, 91-CAA-2 at 5.

Based upon the affidavits submitted by both parties in support of their positions on this motion, I find that the Complainant was not a "hired party" as required by the Darden test. She is the sole proprietor[3] of SSI/ANR, companies which contracted with I & M. [R. Ex. 3] No wages were paid to the Complainant under the terms of the contracts[4] . [R. Ex. 3] No employee benefits were received by her or any other form of compensation. [R. Ex. 3] The Respondent never paid the Complainant's companies for any labor by her under the contracts. [R. Ex. 3] Because she is not a "hired party", the Complainant cannot be considered an employee of I & M, and therefore, cannot make out her *prima facie* case under the ERA.

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Assuming, *arguendo*, that the Complainant is a "hired employee", she still fails to satisfy the Darden analysis and demonstrate she was an employee of I & M. In Darden, the Court set out a list of factors a reviewing court may consider in determining whether or not an individual is an "employee." Darden, 503 U.S. at 323-324. No one factor is decisive and a plaintiff need not satisfy even a majority of the factors to be considered an employee. Id. The factors include

The hiring party's right to control the manner and means by which the product is accomplished;

1. The skill required [by the plaintiff];

2. The source of the instrumentalities and tools;

3. The location of the work;

4. The duration of the relationship between the parties;

5. Whether the hiring party has the right to assign additional projects to the hired party;

6. The extent of the hired party's discretion over when and how long to work;

7. The method of payment;

8. The hired party's role in hiring and paying assistants;

9. Whether the work is part of the regular business of the hiring party;

10. Whether the hiring party is in business;

11. The provision of employee benefits; and,

12. Tax treatment of the hired party.

Id. (Internal citations omitted) Where the Darden factors are not satisfied, dismissal is required. Varnadore v. Oak Ridge Nat'l Lab., 95-ERA-1 at 10 (ALJ Sept. 20, 1995), *aff'd* (ARB June 14, 1996); Plumlee v. Corp. Express Delivery Sys., Inc., ARB NO. 99-051, (ALJ No. 1998-TSC-8 (ARB June 8, 2001).

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Reviewing the relationship between I & M and the Complainant in this case, I find that most of the Darden factors are not satisfied. The relationship between I & M and Ms. Demski was completely contractual. While some employer-employee relationships are governed by employment contracts, this is not a case where the agreement binding the two could be described as an employment contract. This is a case of a business arrangement between companies. Ms. Demski is the sole proprietor of two independent, taxable businesses. She entered into a subcontracting agreement with I & M for her *companies*, not necessarily herself, to perform work for I & M. I & M paid a fee to ANR/SSI for services, but did not pay wages, salary, benefits, compensation, etc., directly to Ms. Demski. Ms. Demski controlled the length of her work hours and, by her own admission, had a flexible work schedule. (C. Ex. 2) Additionally, she did not work at the Cook Plant on a daily basis.[5] (R. Ex. 2) Based on application of the Darden factors, I find that the Complainant is not an employee of I & M, but an independent contractor.

The ARB has carved out a narrow exception to the Darden test and has held that in some circumstances an employee of a subcontractor has standing as an "employee" to bring an ERA whistleblower action against the contracting nuclear facility. Hill v. Tennessee Valley Auth., 87-ERA-23 at 2 (Sec'y May 24, 1989) Furthermore, in Stephenson v. NASA, 94-TSC-5 at 13 (ARB July 18, 2000), the ARB held that whistleblower protections can "encompass an employee who is not a common law employee of the respondent employer." The test is whether the respondent party "acts in the capacity of an employer by establishing, modifying, or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment." Id. at 8. In the present case, the Complainant argues that she is an employee of ANR/SSI, that I & M interfered with her employment relationship with ANR/SSI, and, that therefore, she has standing to bring this claim.

Before addressing whether the Respondent acted in such a way as to interfere with Ms. Demski's work thereby triggering the Stephenson and Hill exceptions, an initial question must be resolved. The issue presented by this argument of the parties is whether a person who is the sole proprietor of a company can also be an employee of that company. For the reasons set forth below, I agree with the Respondent and find that a sole proprietor of a company may not also be an employee of that company.

Several circuit courts of appeals have previously addressed whether sole owners of businesses or partners with ownership interests in a business may be considered employees of that business. The 6th, 8th, and 10th Circuits have each answered that question in the negative. See Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 185 (6th Cir. 1992); Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78 (8th Cir. 1996); Wheeler v. Hurdman, 825 F.2d 257 (10th Cir 1997). Common among these decisions is that a sole owner or partner with ownership interest lacks accountability to a higher authority.

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In order for an individual to be termed an "employee", there must also exist some higher supervisory authority which to whom that individual may be held accountable. An employer, by definition has authority or power over those individuals on its payroll. Darden, 503 U.S. 318 at 322-323. In the case of a sole proprietor of a company, there is no such higher authority. It defies basic logic to think that Ms. Demski was also an employee of the companies which she owned. As owner, only she could set the terms of her own employment, discipline herself, or exercise the attributes one would expect in a traditional employer-employee relationship. As she cannot be said to be an "employee" of ANR/SSI, the Respondent cannot have interfered with her employment relationship with those companies and, therefore, the Stephenson and Hill exceptions are inapplicable in this case.

The Complainant cites two cases for the proposition that a sole proprietor may be considered an employee and have standing under the ERA. See Samodurov v. General Physics Corp., 89-ERA-20 at 2, 4-5 (Sec'y Nov. 16, 1993); Richter v. Baldwin Assoc., 84-ERA-9 at 8 n. 5 (Sec'y Mar. 12, 1986). I have reviewed these decisions and find that they do not stand for the sweeping propositions the Complainant alleges. While both cases do expand the definition of who is a "covered employee" under the Act, neither definitively gives sole proprietors a cause of action under the ERA. Samodurov merely extends the protections of the ERA to applicants for positions at Nuclear facilities. See Samodurov v. General Physics Corp., 89-ERA-20 at 2, 4-5 (Sec'y Nov. 16, 1993). Richter, a pre-Darden case, simply extends the protections to supervisory employees. Richter v. Baldwin Assoc., 84-ERA-9 at 8 n. 5 (Sec'y Mar. 12, 1986). However, in that decision a supervisory employee still must be found to be an "employee". Id. Sole proprietors, are not "employees" and, therefore, I find Richter has no application to the present case.

ORDER

For the reasons stated above, I find that the Complainant, Lydia Demski, has failed to demonstrate she is a "covered employee" as required by the Act. THEREFORE, IT IS HEREBY ORDERED that, the Respondent's motion for dismissal is GRANTED. The Complainant's claim for discrimination under the ERA is DISMISSED with prejudice. The Respondent, Indiana Michigan Power Company, is also DISMISSED as a party to this claim. IT IS FURTHER ORDERED that American Nuclear Resources Inc., Scope Services Inc., and American Electric Power Company are all DISMISSED with prejudice from this action.

DANIEL J. ROKETENETZ
Administrative Law Judge

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NOTICE: This Recommended Order of Dismissal will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 202l0. Such a petition for review must be received the Administrative Review Board within ten business days of the date of this Recommended Order of Dismissal, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.

[ENDNOTES]

[1] In this Order, "ALJX." refers to the Administrative Law Judge exhibits, "R. Ex." refers to the Respondent's exhibits, and "C. Ex." refers to Complainant's exhibits.

[2] Furthermore, the Senate Report accompanying the enactment of §210 of the ERA in 1978 explains that §210 "is substantially identical to the provisions of the CAA and the Federal Water Pollution Control Act." S. Rep. No. 95-848 95th Cong., 2nd Sess. 29, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 7303. Accordingly, cases construing the CAA and similar whistleblower statutes are instructive in construing the ERA.

[3] In addition to the sworn testimony of Mr. Linn stating she is a sole proprietor, the Complainant acknowledged in her original complaint and in her sworn affidavit that she is the sole proprietor of both ANR and SSI. (C. Ex. 2 & (b); R. Ex. 4) The Public filings with the Michigan Bureau of Commercial Services Corporations Division also lists her as the President and Director of both companies. (R. Ex. 1 & 2)

[4] The Complainant, in her sworn affidavit, states that she received a regular paycheck from ANR/SSI and that she received a W-2. (C. Ex. 2) The fact she received a paycheck from ANR/SSI does not assist her in satisfying the Darden factors and establishing that

she was an employee of I & M. Her testimony is also unclear on who, amongst ANR/SSI and I & M issued her W-2.

[5] In her sworn affidavit, the Complainant stated she did work at the Cook plant on regular basis. (C. Ex. 2) However, this statement is inconsistent with the statements she made in her original complaint in which she stated that the Ice Condenser contract was managed by Richard Rigler and the Cook onsite manager for this contract was Richard Smith. (R. Ex. 4; C. Ex. 2(b)). Given these inconsistent statements, I assign little probative weight to her allegations she worked at Cook on a regular basis.